IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77 - 801

FLORA DAUN FOWLER, *Appellant*

v.

MARYLAND STATE BOARD OF LAW EXAMINERS, Appellee

PETITION FOR REHEARING

FLORA DAUN FOWLER
9410 Woodberry Street
Seabrook, Maryland 20801

IN THE SUPREME COURT OF THE

UNITED STATES

FLORA DAUN FOWLER,

Appellant

v.

MARYLAND STATE BOARD OF LAW EXAMINERS,

Appellee

PETITION FOR REHEARING

The appellant herein respectfully moves this Court for an order (1) vacating the dismissal of the appeal entered on January 23, 1978, and (2) granting this petition. As grounds for this motion, appellant states the following:

1. Maryland's Resolution of Another Equal Protection Challenge.

On December 12, 1977, after the filing on December 5, 1977 of appellant's Jurisdictional Statement, the Maryland Court of Appeals

faced another equal protection challenge and struck down an obscenity statute, the State's Obscene Matters Act, because it violated the Fourteenth Amendment of the United States Constitution.

The Maryland Court held the act as one which was discriminatory in proviaing penalties for clerks who distribute obscene materials in adult bookstores,but not providing penalties for projectionists who operate pornographic films in movie theaters.

The Court of Appeals found such unequal treatment repugnant to the constitutional provisions for equal protection. In finding the exemption of projectionists unconstitutional, it voided the entire statute, leaving the State with no obscenity regulations at all.

The opinion in Wheeler v. State of Maryland, No. 66, September Term, 1977, has not yet been reported, but was set forth inthe

Daily Record of December 20, 1977, a copy of which has been lodged with the filing of this petition for rehearing. (See pages 2 & 3). The unconstitutional provisions were found in Sections 417 (2) and 418 of Maryland's Obscene Matters Act, Maryland Code (1957, 1976 Replacement Volume) Article 27.

Judge Orth, who wrote the opinion, stated:

> Equal protection analysis requires strict scrutiny of legislative classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. (Emphasis added.)

When fundamental rights or a suspect class are involved, the classification must be subjected to close judicial scrutiny and must be justified by a compelling state interest.(Emphasis added.)

Equal protection does not require that all persons be dealt with identically, but it does require that a distinction must have relevance to the purpose for which the distinction is made. Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760 (1966).

Compliance with the equal protection clause requires that legislative

> classification rest upon some ground of difference having a fair and substantial relation to the object of the legislation.
>
> If all persons who are in like circumstances or affected alike are treated under the laws the same, there is no deprivation of the equal protection of the law. Conversely, a law which operates upon some persons or corporations, and not upon others like situated or circumstanced or in the same class is invalid.

In Wheeler, the Court held that to be valid the exemption of the motion picture theatre employees would have to rest upon some ground of difference having a fair and reasonable relation to the prohibition against the publicatio printing, sale and distribution of obscene matter, or have a rational relationship to the legitimate state purpose.

In Fowler, the constitutionality of the Rules Governing Admission to the Bar requires that the different treatment of bar applicants have a fair and reasonable relation to the State's purpose of requiring character and competency standards

for admission to the bar, presumably for the protection of the public.

Appellant, Flora Daun Fowler,contends that the exemption of bar applicants from the privilege and right to a hearing where their competency is at issue, bears no fair and rational or reasonable relationship to the statutory purpose of qualifying new attorneys, and is therefore violative of the equal protection clause.

In Maryland State Board of Barber Examiners v. Kuhn, 312 A2d 216, 270 Md.496, 1973, the Maryland Court of Appeals held that a statute prohibiting cosmetologists from cutting and shampooing male hair in the same manner as they cut female hair did not bear a real and substantial relation to the objective of protecting the male public from inadequate training and inferior hygienic standards, and thus was violating the equal protection clause when the very same services were rendered

to female customers for whom such services were admittedly adequate.

In that opinion, Judge Levine stated:

> Nevertheless, if a statute purporting to have been enacted to protect the public health, morals, safety and welfare has no real or substantial relation to those objects or is a palpable invasion of rights secured by fundamental law, it is our duty to so adjudge and thereby give effect to the Constitution. (Emphasis added.)
>
> The decisive question, then, is whether the means selected here bear a real and substantial relation to the object sought to be obtained. We think they do not.

There is the same question arising in Fowler. The exemption of one group of bar applicants, from procedures granting a hearing and opportunity to confront those whose words deprive them of their livelihood, has no real relation to the object of qualifying attorneys for the protection of the public.

The same Court of Appeals which found a duty to decide the constitutional questions in Wheeler and Maryland Board of Barber Examiners v. Kuhn, supra, shirked that duty in the instant case.

2. The Question on the Merits is Open to Possible Contentions Because it has not Been Previously, Specifically and Adversely Ruled Upon as to Absolutely Foreclose Further Contention on the Subject.

In Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311, the Court stated that:"- - - the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has been so specifically and adversely ruled on by the court as to absolutely foreclose further contention on the subject."

The Fowler claim is not a frivolous one nor is it made for purpose of delay. Nor yet does it present a question upon

which this Court has foreclosed possible contentions by an explicit previous decision. The constitutionality of the Rules Governing Admission to the Bar of Maryland has not been heretofore presented to this Court,nor has the precise question of the treatment of different members of the class of bar applicants been ruled upon.

> The power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is per se and inherently Federal. Swafford v, Templeton, 185 U.S. 487, 493.

The subject matter of the Fowler claim is the constitutionality (or rather the lack of it),"per se and inherently Federal", of a state statute or rule.

Can a statute or rule constitutionally give to certain members of a class (bar applicants) constitutional protections which are withheld from other members of the same class,as it does in Rule 12(b) of the Maryland Rules Governing Admission to the Bar?

In dismissing Briggs v. Louisiana State Bar Association, 374 U.S. 96, 83 S.Ct. 1690 (1963) for want of a substantial federal question,this Court may have foreclosed further argument upon the question of whether the lack of any post-examination review is an unconstitutional denial of due process. That is not the issue in Fowler.

The question in Tyler v. Vickery , 517 F.2d 1089, cert. den. 426 U.S. 940 (1975) was whether the bar examination in Georgia was intentionally discriminatory by virtue of the number of black applicants who failed it. No such question arises in Fowler.

The Court's promises of procedural due process, as discussed in Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, in Willner v. Committee on Character and Fitness, 373 U.S.96, and Konigsberg v. State Bar of California , 352 U.S. 252, apparently, while the lang-

uage seemed to include all bar applicants, applied only to those applicants whose character was questioned, not to those whose compentency was an issue.

Justice Goldberg, in his concurring opinion in Willner, supra, (joined in by Justice Brennan and Justice Stewart) stated:

> The constitutional requirements in this context may be simply stated: in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence. (Emphasis added.)

The customarily narrow ruling of the Court then,and in the earlier cases,did not address itself to denial on the basis of competency,as demonstrated by performance on the essay type bar examination.

The above-mentioned decisions do not, and should not, foreclose further arguments to the questions raised by Flora Fowler.

Because of the exemption in Rule 12 (b) of the Maryland Rules Governing Admission to the Bar,and because Maryland provides a limited review of examination papers, the question within the major issues raised is: Where does equal protection end and where does due process begin?

Where a review of sorts has been provided, must that review conform to the ordinary standards of due process?

3. Dismissal of This Case is not in Harmony With the Court's Prior Decisions.

In the face of the dismissal of this case, for appellant, Flora Daun Fowler, the opinion in Goss v. Lopez, 419 U.S. 565,has a hollow ring and a mocking echo.

> Children do not shed their constitutional rights at the schoolhouse door, the 14th Amendment, as applied to the states, protects the citizen against the state itself and all of its creatures, boards of education not excepted.

In Goss, an Ohio statute which permitted a hearing for a student who was expelled but allowed none for a student who was suspended, was held to be unconstitutional. A ten day suspension from school was found not to be de minimis, and neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation was so insubstantial that suspensions could be constitutionally imposed by any procedure the school chose, no matter how arbitrary.

Yet bar applicants,who question the accuracy of the grading of their examinations for the bar,are compelled to "shed their constitutional rights" at the bar examiners' door, no matter how capricious and arbitrary that grading might be.

Even a schoolchild who fails a test is ordinarily entitled to be told why he failed. Not so for the bar applicant- he may only guess as to the reasons for his

failure by inspecting his own unmarked and ungraded examination papers,and by examining model answers which may not contain all the answers to a given question and which,upon occasion, may contain the wrong answers.

As a consumer of services for which he has paid a goodly sum and exerted a tremendous effort, he receives a"package" with no listing of its"ingredients." A purchaser of a can of beans is better protected.

In Morey v. Doud, 354 U.S. 457, a state regulatory statute which exempted the American Express Company from the provisions of the act was held violative of the equal protection clause of the 14th Amendment because the discrimination had no reasonable relation to the purpose of the act which was to protect the public when dealing with currency exchanges.

The Maryland Rules Governing Admis-

sion to the Bar are for the protection of the public when dealing with attorneys in Maryland.

> When it has been determined by the Court that a candidate is qualified to practice law and is of good moral character, an order shall be passed directing that he be admitted to the bar. (Article 10, Section 10, An. Code of Maryland)

The Morey Court stated that a statutory discrimination must be based on differences reasonably related to the purpose of the act in which it is found.

There is no such reasonable basis for a discrimination in the Maryland Rules Governing Admission to the Bar.

The public is entitled as equally to be protected from incompetent attorneys as from immoral ones. And bar applicants should be equally provided with an opportunity to rebut either condition which may preclude them from the practice of law.

In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held that the denial of a hearing, on fitness, to unwed

fathers, as accorded to all other parents, constituted a denial of due process. Again, in Eisenbladt v. Baird, 405 U.S. 438, this Court held that a Massachusettts statute which provided dissimilar treatment for married and unmarried persons, similarly situated, in the distribution of contraceptives, violated the equal protection clause.

> If a state statute impinges upon fundamental freedoms protected by the Constitution, the statutory classification must, under the Equal Protection Clause, be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest.

In Dunn v. Blumstein, 405 U.S. 330, this Court stated:

> Under the strict scrutiny Equal Protection test which invalidates a statute unless the state can demonstrate that such statute is necessary to promote a compelling government interest, the state bears a heavy burden of justification and the statute will be closely scrutinized in light of its asserted purpose.

In dismissing this appeal the United States Supreme Court has relieved the State of Maryland from carrying the burden of such a justification.

The court, in Keenan v. Board of Law Examiners of the State of North Carolina, 317 F. S. 1350 (1970) stated:

> In licensing attorneys there is but one constitutionally permissible state objective: the assurance that the applicant is capable and fit to practice law.

So it is in Maryland. Any statutory distinction made between bar applicants, which discriminates against some of them, and has no reasonable relation to the objective of the rules, is violative of the Equal Protection Clause, and as a consequence of such discrimination, the Due Process Clause is violated as well. Under those Rules, the fundamental rights of Flora Daun Fowler have also been violated.

Retaking a bar examination does not satisfy the requirements of equal protection or of due process. Appellant is claiming that there was no basis for the finding that she failed to pass the bar examination in February of 1977. In her Exceptions and Addendum thereto she explained her position. (Exceptions and the Addendum are part of the record which was filed at the same time Flora Fowler's Jurisdictional Statement was filed in this Court.)

Taking another examination does not answer the question of whether the previously taken examination was improperly or mistakenly graded, or whether the Board's own answers were wrong or not supported by law in the State of Maryland. Nor would a retake resolve or "cure" such errors or defects in grading should they exist, or make up for the time lost from the practice of law.

The post bar examination procedure described in Harper v. District of Columbia Committee on Admissions, 375 A.2d 25, 26, (1977) more clearly satisfies

due process requirements than does re-taking an examination.

> Upon request, the applicant may meet with the Secretary to the Committee for a review of his essay paper and the questions as framed by the examiners and the examiners' comments with respect to each question. An unsuccessful applicant may submit within a fixed time, without identifying himself, a petition for regrading to each examiner he wishes with supporting reasons. The Secretary must submit to each examiner so petitioned, the petition, the petitioner's examination book and the examiner's questions and comments with respect to such questions. The unsuccessful applicant is notified by the Secretary of the examiner's ultimate disposition of his petition for regrading and the applicant may obtain, upon request, finally a review of the regrading petition and the examiner's disposition thereof by two other members of the Committee.

Under these provisions an applicant has an opportunity to be heard and to be given reasons for the examiner's grades (the notice requirement). It is not impossible for Maryland to initiate a similar system or at least one more similar to the provisions available where one's character

is at issue.

Appellant,Flora Daun Fowler, apologizes to the Court for the lengthy petition, but she felt it necessary to say all these things, and so she said them.

CONCLUSION

For the foregoing reasons, Flora Daun Fowler petitions this Court to grant rehearing, vacate the order of dismissal and review the judgment below; and allow the appellant to attempt to persuade this Court that, as a bar applicant, she is as much entitled to equal protection and due process of the law as the schoolchildren in Goss, the unwed fathers in Stanley, the currency exchanges in Morey, the unmarried persons in Eisenbladt, the cosmetologists in State Board of Barber Examiners, and the pornographers in Wheeler.

Respectfully submitted,

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